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ESSAY

THE UNITED STATES' APPROACH TO INTERNATIONAL CIVIL LITIGATION: RECENT DEVELOPMENTS IN FORUM SELECTION

STEPHEN B. BURBANK*

1. INTRODUCTION

In a review essay published seven years ago,¹ I engaged the argument made by Gary Born that international civil litigation was, or was about to be, a discrete field in the United States.² While praising Born's book, I argued that international civil litigation is not a field, at least not of a "functional kind," one which seeks "to

* David Berger Professor for the Administration of Justice, University of Pennsylvania. This Essay is based on a lecture given to the Penn Law European Society in Milan, Italy, in May 1997, and to the German American Law Association in Frankfurt, Germany, in December 1997. Daniel J. Dorward, class of 1998, provided valuable research assistance.

¹ See Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456 (1991).

² See GARY B. BORN & DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS* 1-3 (1989). Mr. Born is a distinguished graduate of the University of Pennsylvania Law School, class of 1981.

realize some underlying kind of justice.”³ Rather, I suggested, it is better viewed “as part of a process of cross-fertilization in which (1) doctrine and techniques developed in the context of domestic cases are brought to bear on problems presented in international litigation, and (2) the increasingly international dimensions of litigation in our courts prompt changes in doctrine and techniques, which are then applied in domestic cases.”⁴

In the same essay, I also explored the normative question whether there should be a discrete field of international civil litigation.⁵ I suggested that the answer might depend on the role that international law can and should usefully play. I concluded that “one form of international law, custom, has only a limited role to play”⁶ and that, although there is normatively a much greater role for treaties, even here the potential had not been realized, and the reason had to do with power issues that were not unique to international litigation.⁷

Forum selection occupies a great deal of the attention and energy of international practitioners, prior to and in response to the initiation of a lawsuit. Recent developments in the United States’ approach to forum selection provide a welcome opportunity to pursue further both the positive and the normative questions regarding international civil litigation as a field. I shall discuss three aspects of forum selection: service of process under the Hague Service Convention,⁸ personal jurisdiction under Federal Rule of Civil Procedure 4(k)(2), and *lis alibi pendens*. My focus in discussing each will be fairly narrow, but as to each I shall make connections with these more general questions.

2. SERVICE OF PROCESS UNDER THE HAGUE CONVENTION

The Hague Service Convention was the first treaty on matters of private international law to which the United States became a party. For most of U.S. history, isolationism and the supposed

³ Michael S. Moore, *A Theory of Criminal Law Theories*, in 10 TEL AVIV UNIV. STUDIES IN LAW 115, 131 (Daniel Friedmann ed., 1991).

⁴ Burbank, *supra* note 1, at 1459.

⁵ *See id.* at 1473-97.

⁶ *Id.* at 1474.

⁷ *See id.*

⁸ Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *approved* Oct. 28, 1964, art. 2, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Hague Service Convention].

requirements of federalism prevented active cooperation in international lawmaking as to such matters, with the result that the United States joined the Hague Conference on Private International Law only in 1964.⁹

As it turned out, that was just in time for this country to participate in the later stages of the formulation of the Hague Service Convention, the initial draft of which had been prepared before the United States joined the organization. I mention that fact because, if one were to read only the record of domestic deliberations concerning the Hague Service Convention, one would think that it represented a triumph of U.S. initiative and ideas.¹⁰ In fact, a comparison of the draft convention and the final product reveals that the United States made only minor contributions.¹¹

The contrary story that was told to the United States Senate and to the public was, I believe, part of a rhetorical strategy designed to play to the traditional American belief that the way we do things is the best way to do things—a belief that is as much the product of ignorance as it is of chauvinism. In addition, the story was that, as a result of our success at the Hague, the Convention required very little change in domestic—although it would have profound effect on many other countries’—practice. Against the backdrop of a long history of isolationism and concern for the supposed prerogatives of the states of the United States, proponents of international involvement thought it best to represent participation in international lawmaking as costless.¹²

Even if understandable at the time and for the purposes for which it was initially deployed, this rhetorical strategy has continued to have effects, with the result that the United States has been what I have called a “reluctant partner”¹³ in making procedural law for international civil litigation. In connection with service of process, the effects of the attitudes that the strategy expresses have been felt both in cases interpreting the Hague Service

⁹ See Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, 57 LAW & CONTEMP. PROBS. 103, 103-04 (1994).

¹⁰ See, e.g., S. Exec. Doc. C, 90th Cong., 1st Sess. 20 (1967) (report of the U.S. Delegation).

¹¹ See Burbank, *supra* note 9, at 129-31.

¹² See *id.* at 129-31, 136-37.

¹³ *Id.*

Convention and in fashioning amendments to the Federal Rules of Civil Procedure. I propose briefly to discuss the former.¹⁴

In the *Schlunk* case,¹⁵ the Supreme Court of the United States held that, although the Hague Service Convention is mandatory when there is occasion to transmit a judicial document for service abroad in another signatory state, the internal law of the forum (state or federal) alone determines whether in fact the applicable method of serving process requires transmittal of documents abroad in order to be effective.

Rejecting the view of three concurring Justices that the Convention itself imposes a check on internal forum law, the Court expressed doubt "that this country, or any other country, w[ould] draft its internal laws deliberately so as to circumvent the Convention in cases in which it would be appropriate to transmit judicial documents for service abroad." The Court also found comfort in due process protection of foreign nationals and noted practical considerations that are likely to prompt resort to the Convention even when it is not mandatory.¹⁶

I have criticized the *Schlunk* decision, its premises and reasoning, on numerous grounds.¹⁷ My primary concern has been the Court's failure to accord the Service Convention, which is supreme law under our Constitution,¹⁸ the respect due even an ordinary federal statute by failing to engage the policies animating it and to consider the interpretative rules they might reasonably be thought to require. This failure, which also characterized the Court's *Aerospatiale* decision,¹⁹ interpreting the Hague Evidence Convention,²⁰ bespeaks unwillingness to upset the uniformity of

¹⁴ For a discussion of the effects of such attitudes on amendments to the Federal Rules of Civil Procedure, see *id.* at 111-24, 152.

¹⁵ *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988).

¹⁶ *Burbank*, *supra* note 1, at 1478 (footnotes omitted) (quoting *Schlunk*, 486 U.S. at 705).

¹⁷ See *id.* at 1478-80; *Burbank*, *supra* note 9, at 131.

¹⁸ U.S. CONST. art. VI, cl. 2.

¹⁹ *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522 (1987).

²⁰ Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *adopted* Oct. 26, 1968, art. 2, 23 U.S.T. 2555, 847 U.N.T.S. 231.

domestic law in the interest of international uniformity. It bodes ill for effective participation by the United States in the process of international lawmaking.²¹

It was thus a source of pleasure and relief to read two recent trial court opinions holding that compliance with the Hague Service Convention was required even though the relevant state law provided for service on an agent within the state.²² In both cases the state statutes by which the federal courts measured the effectiveness of service permitted in-state service on an agent of the defendant, as in *Schlunk*.²³ Both also required, however, that copies of the service papers be mailed to the defendant, which in these cases, meant mailed abroad.

In one of these cases, *Kim v. Frank Mohn A/S*,²⁴ the plaintiff served the defendant's wholly owned Texas subsidiary and mailed a copy directly to the defendant in Norway, as required by the Texas long-arm statute. Relying on Texas decisions holding that failure to mail a copy of the process to the nonresident defendant deprived the court of jurisdiction, the federal court concluded that the required notice was an integral part of service and that therefore the Hague Service Convention applied.²⁵ The court did not proceed to inquire whether mailing a copy of the process constituted compliance.²⁶ Had it done so, it would have discovered that Norway has objected to the use of the mails under Article 10(a) of the Convention.²⁷

Kim was a case in which state law alone prevented evasion of the Service Convention by the technique that was approved in *Schlunk*. A more recent case from Delaware suggests that the Supreme Court's decision may have even more limited practical importance as a matter of treaty law. If so, it is because a limitation upon which the Court placed some emphasis in attempting to al-

²¹ See Burbank, *supra* note 9, at 131.

²² See *Kim v. Frank Mohn A/S*, 909 F. Supp. 474 (S.D. Tex. 1995); *Quinn v. Keinicke*, 700 A.2d 147 (Del. Super. Ct. 1996).

²³ See *Schlunk*, 486 U.S. at 706.

²⁴ 909 F. Supp. 474 (S.D. Tex. 1995).

²⁵ See *id.* at 479.

²⁶ The court ordered the plaintiff, within sixty days, "to forward a proper letter of request for service to the proper Norwegian authority, in accordance with the requirements of the Hague Convention." *Id.* at 480.

²⁷ See GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 811 (3d ed. 1996).

lay concern about its holding—due process of law²⁸—plays more roles in the analysis than the Court may have contemplated.

*Quinn v. Keinicke*²⁹ involved a lawsuit against a defendant residing in Denmark as a result of an automobile accident in Delaware. Delaware law required the plaintiff to serve process on the Delaware Secretary of State and also to send a copy by registered mail to the nonresident defendant. In ruling on the defendant's motion to dismiss for insufficiency of service, the Delaware Superior Court held that the Hague Service Convention was applicable because notice had to be transmitted abroad for service to be complete.³⁰

For these purposes, what is interesting about *Quinn* is not its interpretation of Delaware state law, but rather its reasoning that transmittal abroad was also required by the due process clause. In essence, the court recognized that due process is the law of every forum in the United States, with the result that when due process requires transmittal of notice abroad, compliance with the Service Convention is mandatory.³¹

Although the Delaware court in *Quinn* apparently thought that it was merely following the Supreme Court of the United States in this aspect,³² there may be less in the Court's opinion than met its eye. For in *Schlunk* the Court saw a role for due process primarily and perhaps only as the last defense of a foreign national when service is made according to state law but the notice provided is constitutionally inadequate.³³ Under the approach taken in *Quinn*, service may prove ineffective even when constitutionally adequate notice has been given, because the due process element in the analysis triggers the additional requirements of the Hague Service Convention.

²⁸ See *Schlunk*, 486 U.S. at 705-06; *supra* text accompanying note 16.

²⁹ 700 A.2d 147 (Del. Super. Ct. 1996).

³⁰ See *id.* at 154.

³¹ See *id.*

³² See *id.*

³³ See *Schlunk*, 486 U.S. at 705-06. There is language in the Court's opinion that may indicate awareness of a greater role for due process than that was relied on in *Quinn*, see 700 A.2d at 154:

Where service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends and the Convention has no further implications.

Schlunk, 486 U.S. at 707.

Even though the *Quinn* court may have misread *Schlunk*, I applaud its reasoning, both because it represents a more coherent view of the nature of internal forum law, particularly for international purposes,³⁴ and because, if followed by other courts, it would bring the United States closer to a defensible position in connection with the Hague Service Convention.³⁵ Closer, but we would still not be there yet. Even those who sold the Service Convention to the United States Senate recognized, although they had difficulty admitting, that the Convention itself would require some changes in domestic law.³⁶ One of the situations they had in mind was suits under nonresident motorist statutes, like that in *Quinn*, but where service on the Secretary of State alone sufficed for effective service under domestic law:³⁷ the American version

³⁴ "In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear." *United States v. Belmont*, 301 U.S. 324, 331 (1937); cf. Stephen B. Burbank, *Federal Judgments Law: Sources of Authority and Sources of Rules*, 70 TEX. L. REV. 1551, 1575 (1992) (noting difficulties faced by courts in other countries when asked to determine whether reciprocity requirement for recognition of judgments is met "based on case law from one of fifty-one lawmaking jurisdictions" in the United States).

³⁵ For concerns of other signatory states about the Supreme Court's interpretation of the Hague Service Convention in *Schlunk*, see Hague Conference on Private International Law: Special Commission Report on the Operation of the Hague Service Convention and the Hague Evidence Convention, 28 I.L.M. 1556, 1560-61 (1989); Peter H. Pfund, *United States Participation in Transnational Lawmaking*, in LEX MERCATORIA AND ARBITRATION 167, 176 (Thomas E. Carbonneau ed., 1990).

³⁶ See Burbank, *supra* note 9, at 130-31.

³⁷ Article 16 makes no substantial change in our present discretionary equitable practice but Article 15, when a defendant is in a foreign country, may make a minor change in the practice of some of our States in long-arm and automobile accident cases.

If, in a particular state, service on the appropriate official need be accompanied only by a minimum effort to notify the defendant and if a default judgment may be entered in as short a period as 30 or 60 days, *the convention will require greater protection of the defendant who lives outside the United States in a convention country*. A greater effort must be made to serve such a defendant and the time for the entry of the default judgment may be delayed until the expiration of the 6 months' minimum period in article 15.

S. EXEC. REP. NO. 6, 90th Cong., 1st. Sess. 15 (1967) (statement of Philip W. Amram) (emphasis added). See S. EXEC. DOC., *supra* note 10, at 6 (letter of submittal).

of *notification au parquet*.³⁸

Finally in connection with service, another aspect of *Quinn* is worthy of note. There is a well-known split, which might more accurately be described as a chasm, concerning the proper interpretation of Article 10(a) of the Service Convention.³⁹ That provision specifies that, so long as the state of destination does not object, "the convention shall not interfere with . . . the freedom to send judicial documents, by postal channels, directly to persons abroad."⁴⁰ Some United States courts have held that, in the absence of a reservation, Article 10(a) is authority for service by mail;⁴¹ others, relying in part on the use of the word "send" rather than "serve," have held that it does not treat of service.⁴²

In *Quinn*, the Delaware court, having held that the Service Convention applied, went on to conclude that there was compliance with Article 10(a), to which Denmark has not objected. The court reasoned that, even if Article 10(a) did not authorize service by mail, it reached the case before the court, in which service was made on the Delaware Secretary of State but documents were required to be sent abroad for that service to be effective.⁴³

3. PERSONAL JURISDICTION UNDER FEDERAL RULE OF CIVIL PROCEDURE 4(K)(2)

Among the arguments made by those who sought to persuade United States lawmakers to take a more sanguine view of participation in international lawmaking was that federalism concerns had long prevented effective procedural reform in the federal

³⁸ *Notification au parquet* permits service of process on a foreign defendant by the deposit of documents with a designated local official. Although the official generally is supposed to transmit the documents abroad to the defendant, the statute of limitations begins to run from the time the official receives the documents, and there is allegedly no sanction for failure to transmit them.

Schlunk, 486 U.S. at 703.

³⁹ See, e.g., BORN, *supra* note 27, at 811; Burbank, *supra* note 1, at 1486-87.

⁴⁰ Hague Service Convention, *supra* note 8, art. 10(a), 20 U.S.T. at 363, 658 U.N.T.S. at 169.

⁴¹ See, e.g., *Ackermann v. Levine*, 788 F.2d 830, 839-40 (2d Cir. 1986).

⁴² See, e.g., *Bankston v. Toyota Motor Corp.*, 889 F.2d 172 (8th Cir. 1989).

⁴³ See *Quinn*, 700 A.2d at 155-56.

courts but that these concerns had been overcome in 1938 when the Federal Rules of Civil Procedure became effective.⁴⁴

It has taken many more years for the Federal Rules themselves to reflect the reality that international civil litigation requires special attention, and not all of that attention has been as sympathetic to international goals as it has been to domestic goals.⁴⁵ One of the recent amendments to the Federal Rules⁴⁶ is likely to be neglected because it is not explicitly targeted at international litigation, although that is necessarily where it will have impact.

Until 1993, the answer to the question whether a federal court could exercise personal jurisdiction over a defendant, domestic or international, turned in most cases on the law of the state in which the federal court sat, as limited by the Due Process Clause of the Fourteenth Amendment. That is not because the federal government lacked the power to assert jurisdiction more expansively. Indeed, a few federal statutes, at least as interpreted, do so.⁴⁷ Where there was no federal statute speaking to the question, however, the federal courts concluded that they were remitted to Rule 4 of the Federal Rules of Civil Procedure, and by that rule in most cases to the jurisdictional arrangements governing in the state in which they sat.⁴⁸

This was manifestly unsatisfactory in situations in which the federal government, and hence the federal courts, had the potential to resolve disputes not capable of resolution in any state. As the Supreme Court recognized in *Omni Capital*, one such situation involved federal law claims against alien defendants who lacked the necessary affiliating circumstances with any individual state but who could constitutionally be subjected to personal jurisdiction in federal court if there were authority in positive law.⁴⁹ In that case, as is typical, the federal statute did not address the question of personal jurisdiction, and the Court declined to fashion a judge-made amenability standard, even on the assumption

⁴⁴ See Harry L. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 562 (1953).

⁴⁵ See Burbank, *supra* note 9, at 111-24.

⁴⁶ See FED. R. CIV. P. 4(k)(2).

⁴⁷ See, e.g., 15 U.S.C. § 22 (1994); *Go-Video, Inc. v. Akai Elec. Co.*, 885 F.2d 1406 (9th Cir. 1989).

⁴⁸ See, e.g., *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104-08 (1987).

⁴⁹ *Id.* at 111.

that it had the power to do so. The Court went out of its way, however, to suggest that the problem might be solved through court rulemaking under the Rules Enabling Act.⁵⁰

Those responsible for proposing amendments to the Federal Rules initially responded to the Court's invitation with an ambitious provision that would have authorized a federal court to assert personal jurisdiction to the limits of Fifth Amendment due process in any case involving a federal claim. Critics, including this one, argued that, invitation or no, and however desirable as a policy matter, such a rule was beyond the Supreme Court's power under the Enabling Act.⁵¹ Chastened, the rulemakers dramatically scaled back the proposal and took the extraordinary step of warning the Court and Congress that there was a question about the validity of even the scaled back version.⁵²

Rule 4(k)(2), effective at the end of 1993, provides that "[i]f the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons . . . is . . . effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state."⁵³

It is risky business to paint a picture of a litigation landscape in the United States with only the view afforded by published opinions, since, in area after area, study of decisions published and unpublished reveals that such a picture is likely to be distorted.⁵⁴ Still, even acknowledging that Rule 4(k)(2) has been in effect for only four years, it is striking what little light has been shed on it by the courts. There are less than ten opinions of courts of appeals, and approximately fifty of district courts, that even mention the Rule, and few of those opinions treat disputed issues.

One of the most important questions presented by Rule 4(k)(2) concerns the proper amenability standard under the Due Process Clause of the Fifth Amendment.⁵⁵ Prior to 1993, in cases

⁵⁰ See *id.* at 108-11.

⁵¹ See Burbank, *supra* note 1, at 1484 n.164.

⁵² See *id.*; Burbank, *supra* note 9, at 146 n.347.

⁵³ FED. R. CIV. P. 4(k)(2).

⁵⁴ See, e.g., RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, at 59 (Stephen B. Burbank, reporter, 1989).

⁵⁵ The Advisory Committee was agnostic on this question, noting that the "Fifth Amendment requires that any defendant have affiliating contacts with

where federal courts believed that they were authorized to apply a distinctively federal amenability standard under the Fifth Amendment, some of them inquired only into a defendant's contacts with the United States,⁵⁶ while others asked the additional question whether, even if there were minimum contacts, an exercise of jurisdiction would be reasonable, taking account of such matters as the interests of the plaintiff, of the forum, and of the interstate or international system.⁵⁷

Since the Supreme Court's decision in the *Asahi* case,⁵⁸ it has been clear that jurisdictional analysis under the Due Process Clause of the Fourteenth Amendment requires consideration of both minimum contacts and reasonableness. It is inconceivable to me that, having struggled so long and hard to work out the relationship between power and reasonableness in that context,⁵⁹ the Court would hold that reasonableness is irrelevant under the Fifth Amendment. It is particularly inconceivable that the Court would do so in a case brought pursuant to Rule 4(k)(2), which

the United States," and suggesting that "[t]here also may be a further Fifth Amendment constraint in that a plaintiff's forum selection might be so inconvenient to a defendant that it would be a denial of 'fair play and substantial justice.'" FED. R. CIV. P. 4(k)(2) advisory committee's note. The Committee also observed that the "availability of transfer for fairness and convenience under § 1404 should preclude most conflicts between the full exercise of territorial jurisdiction permitted by this rule and the Fifth Amendment requirement of 'fair play and substantial justice.'" *Id.*

Another important question is whether Rule 4(k)(2) is limited to federal question cases brought under 28 U.S.C. § 1331 or extends to any case involving claims under federal law, no matter what the source of subject matter jurisdiction. For a decision holding that the Rule is not limited, and thus extends to maritime claims, see *World Tankers Corp. v. M/V Ya Mawlaya*, 99 F.3d 717 (5th Cir. 1996).

⁵⁶ See, e.g., *Go-Video, Inc. v. Akai Elec. Co.*, 885 F.2d 1406 (9th Cir. 1989). "Whether the forum within the United States is convenient to the defendant is a question of venue and discretionary doctrines allowing transfers; it has nothing to do with judicial power." *United Rope Distrib., Inc. v. Seatriumph Marine Corp.*, 930 F.2d 532, 534 (7th Cir. 1991).

⁵⁷ See, e.g., *GRM v. Equine Inv. & Mgt. Group*, 596 F. Supp. 307 (S.D. Tex. 1984). For a post-1993 decision taking this approach, see, for example, *Republic of Panama v. BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 947-48 (11th Cir. 1997). For criticism of the analysis in this decision, based on the fact that the issue of jurisdiction involved a domestic defendant, see Recent Case, 111 HARV. L. REV. 1359 (1998); see also *infra* text accompanying notes 69-78 (discussing tag jurisdiction).

⁵⁸ *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

⁵⁹ See Burbank, *supra* note 1, at 1467-71.

would necessarily be a case with international dimensions like those in *Asahi*.

The Supreme Court has not yet interpreted Rule 4(k)(2), but the lower courts have, by and large, reached what by my lights is the correct result. A particularly interesting example is found in a recent opinion of the United States District Court for the Southern District of New York in *Aerogroup International, Inc. v. Marlboro Footworks, Ltd.*⁶⁰ In that case the judge granted the motions to dismiss of two Canadian corporations after a probing analysis of both their contacts with the United States and the reasonableness of exercising jurisdiction.⁶¹

Aerogroup is also interesting because of the court's treatment of another important question raised by Rule 4(k)(2). Recall that the Rule's authority to apply a federal amenability standard applies only with respect to a "defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state."⁶² It has been observed that Rule 4(k)(2) may lead to some "anomalous litigation positions,"⁶³ including the argument of a defendant that it is subject to state court jurisdiction, since if so it can avoid federal court jurisdiction under Rule 4(k)(2). In fact, the Rule raises more questions than it answers,⁶⁴ including questions concerning the procedures to be employed in probing the existence of state court jurisdiction.⁶⁵

In *Aerogroup*, the plaintiff asserted that the court had jurisdiction over the two Canadian corporations under New York law and, in the alternative, under Rule 4(k)(2). Having found that there was no jurisdiction under the New York long-arm statute, and noting the requirements of Rule 4(k)(2), the court—seemingly on its own motion—engaged in a detailed inquiry into jurisdiction in Massachusetts, which it deemed the only other state with which the Canadian corporations might have sufficient contacts to justify exercising jurisdiction.⁶⁶

If, indeed, the court's inquiry into jurisdiction over the defendants in Massachusetts was undertaken on its own motion, it was

⁶⁰ 956 F. Supp. 427 (S.D.N.Y. 1996).

⁶¹ See *id.* at 438-42.

⁶² FED. R. CIV. P. 4(k)(2).

⁶³ BORN, *supra* note 27, at 197.

⁶⁴ See Burbank, *supra* note 1, at 1484 n.164.

⁶⁵ See BORN, *supra* note 27, at 197.

⁶⁶ See *Aerogroup*, 956 F. Supp. at 432-38.

a self-inflicted wound. For purposes of personal, as opposed to subject matter, jurisdiction,⁶⁷ it cannot be the responsibility of the court to conduct a blue sky investigation of the fifty states. It would also make little sense to require the plaintiff initially to attempt to negate jurisdiction in the fifty states.⁶⁸ Rather, it would seem sensible to require a defendant resisting jurisdiction under Rule 4(k)(2) to assert that he is subject to jurisdiction in a specific state and why. The burden would then shift, according to the applicable standard, to the plaintiff to negate jurisdiction in the specified state(s).

Finally, another interesting question in connection with Rule 4(k)(2), which both Gary Born and I noted in comments on the rule when first proposed,⁶⁹ concerns the role, if any, that so-called tag service plays in conferring jurisdiction under its provisions. Regrettably and, in light of international developments, ironically,⁷⁰ the Supreme Court blessed the constitutionality of personal jurisdiction asserted through in-state service in its 1990 *Burnham* decision.⁷¹ The language of Rule 4(k)(2) would support tag service within the United States.⁷² Yet, even though I have argued that the Court should interpret the Due Process Clause of the Fifth Amendment as it does the counterpart in the Fourteenth

⁶⁷ Compare FED. R. CIV. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action") with *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982) (waivability of personal jurisdiction requirement supports conclusion that due process does not impose an independent federalism restriction on sovereign power of the court).

⁶⁸ See BORN, *supra* note 27, at 197. But see *CFMT Inc. v. Steag Microtech, Inc.*, No. 95-442-LON, 1997 U.S. Dist. LEXIS 7905, at *24 n.10 (D. Del. Jan. 9, 1997) ("This Court interprets the directive of Rule 4(k)(2) to require that [sic] the party opposing the motion to dismiss to affirmatively represent and demonstrate that the defendant is not subject to the jurisdiction of any state, not solely the state in which the district court is located.")

⁶⁹ See Statement of Gary B. Born on Proposed Amendments to Federal Rules of Civil Procedure Affecting International Litigation 8-11 (Feb. 2, 1990) (on file with author); Letter from Stephen B. Burbank to Committee on Rules of Practice and Procedure 3 (Mar. 14, 1990) (on file with author).

⁷⁰ "There is irony in that a rule once justified in terms of principles of international law 'is no longer acceptable under international law if [presence] is the only basis for jurisdiction and the action in question is unrelated to that state.'" Burbank, *supra* note 1, at 1468 n.66 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 reporters' note 5 (1987)).

⁷¹ *Burnham v. Superior Court of Cal.*, 495 U.S. 604 (1990).

⁷² See *supra* text accompanying note 53.

Amendment in other contexts,⁷³ there may be a basis for a distinction here.

The linchpin of Justice Scalia's analysis in *Burnham* is history, the "pedigree"⁷⁴ of state court tag jurisdiction. The history of federal court tag jurisdiction is murky, if there is a history at all. Supreme Court decisions of which I am aware that may seem to support federal court tag jurisdiction are at most dictum on that question and can fairly be confined to the question of the territorial limits of service.⁷⁵ Moreover, should the question arise,⁷⁶ the breathtaking scope of the alien venue statute⁷⁷ could test the notion that reasonableness does not matter under Rule 4(k)(2).

I have not been able to find any decisions on this question. The issue was raised, albeit in the exotic context of enforcement jurisdiction concerning an administrative subpoena issued by the Securities and Exchange Commission, in a recent case in the Tenth Circuit. The court declined to reach it, however, concluding that the individual served with the subpoena "independently ha[d] sufficient minimum contacts with the United States to support the district court's exercise of personal jurisdiction enforcing the subpoenas."⁷⁸

4. LIS ALIBI PENDENS

The third and last aspect of forum selection to be discussed is veiled in the decent obscurity of the Latin phrase *lis alibi pendens*, which literally translated means lawsuit pending elsewhere. In

⁷³ See *supra* text accompanying note 59.

⁷⁴ *Burnham*, 495 U.S. at 621 (plurality opinion). Note that no part of Justice Scalia's opinion commanded a majority of the Court. See *id.* at 606-07.

⁷⁵ See *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 442 (1946); *Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 622 (1925); *United States v. Union Pacific R.R.*, 98 U.S. 569, 603-04 (1879); *Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 328 (1838).

⁷⁶ Given the peculiar inquiry called for by Rule 4(k)(2), making relevant the defendant's amenability to jurisdiction in state court (where tag jurisdiction is constitutionally permitted if authorized as a matter of state law), perhaps the question could only arise if the case were not one that could be brought in state court. See *infra* text accompanying note 78.

It should be noted in addition that, the constitutional question aside, Rule 4(k)(2) need not be interpreted to permit tag jurisdiction.

⁷⁷ 28 U.S.C. § 1391(d) (1994) ("An alien may be sued in any district."). For the role of transfer, see *supra* note 55.

⁷⁸ *Application to Enforce Admin. Subpoenas Duces Tecum of the SEC v. Knowles*, 87 F.3d 413, 416 n.5 (10th Cir. 1996).

the parlance of U.S. law, the issue raised is whether and when one court should stay or dismiss the action pending before it because there is a duplicative or related action pending before another court. It is, as Professor Andreas Lowenfeld recently observed, an issue that arises with greater and greater frequency, as "[f]orum shopping, which used to be a favorite indoor sport of international lawyers, has developed into a fine art."⁷⁹

Recall that I described international civil litigation not as a field but as part of a process of "cross-fertilization."⁸⁰ That process has its risks, and I suggest that some of those risks have been realized in the formulation and application of standards for staying international litigation in U.S. courts. It appears that, at least until recently, the federal courts followed some variant of two quite different approaches to the question whether an American court should stay or dismiss proceedings before it in deference to litigation elsewhere.⁸¹

One group of cases follows the model of duplicative or related proceedings wholly within the federal court system, a model that makes it quite easy to obtain a stay, particularly from the court where the second action was filed.⁸² In the domestic context furnishing the model, both courts are part of the same (federal) system of courts, and differences between them can be settled by higher authority (the United States Supreme Court). Neither is true when it is proposed that a United States court stay its proceedings in favor of litigation abroad. This may suggest that, even though the costs of rewarding victory in the race to the courthouse are not thought to be equal to those of duplicative proceedings in the domestic context, the calculus should be different in the international context.

The polar opposite approach has been taken in another group of cases, which use as their model for international cases the decisions of federal courts that have been asked to abstain in favor of state court proceedings in the interest of "wise judicial administra-

⁷⁹ Andreas F. Lowenfeld, *Forum Shopping, Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation*, 91 AM. J. INT'L L. 314, 314 (1997).

⁸⁰ *Supra* text accompanying note 4.

⁸¹ See BORN, *supra* note 27, at 462.

⁸² See, e.g., *Continental Time Corp. v. Swiss Credit Bank*, 543 F. Supp. 408 (S.D.N.Y. 1982) (following *Landis v. North American Co.*, 299 U.S. 248 (1936)).

tion.”⁸³ These cases, which apply the standards set forth by the Supreme Court in its *Colorado River* decision,⁸⁴ make it much more difficult to obtain deference to foreign proceedings, since their basic premise is that federal courts have a “virtually unflagging obligation”⁸⁵ to exercise the subject matter jurisdiction that has been conferred by statute, with the result that they may decline to do so only in “exceptional circumstances.”⁸⁶

Fortunately, recent decisions of the Supreme Court seem to clear up a good deal of the analytical and doctrinal confusion evident in the contrasting approaches taken in the international context by clarifying the reach and limits of the domestic models on which they are based.

First, in 1995, the Supreme Court made clear that a federal court in which a litigant has sought a declaratory judgment in anticipation of or reaction to a coercive action in state court should consider the impact of the state proceedings as part of the discretionary inquiry appropriate to the remedy sought rather than under *Colorado River*.⁸⁷ I assume that the same is true when the duplicative or related proceedings have been or would be commenced in another country.

Second, perhaps reacting to powerful critiques of its domestic abstention decisions,⁸⁸ and drawing further on its declaratory judgment decisions, in 1996 the Supreme Court sought to rationalize prior cases in *Quackenbush v. Allstate Insurance Co.*⁸⁹ There, the Court drew a sharp distinction between a dismissal and a stay, reasoning that the latter involved no failure or refusal to exercise subject matter jurisdiction, while the former might, and that such failure or refusal could be justified only in cases where the relief sought was equitable or otherwise discretionary.⁹⁰

⁸³ See, e.g., *Ingersoll Milling Machine Co. v. Granger*, 833 F.2d 680 (7th Cir. 1987).

⁸⁴ *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

⁸⁵ *Id.* at 817.

⁸⁶ *Id.* at 813.

⁸⁷ See *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995).

⁸⁸ See, e.g., MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER* 47-74 (1991). But see David Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985).

⁸⁹ 116 S. Ct. 1712 (1996).

⁹⁰ See *id.* at 1723.

The Court's decision in *Quackenbush* was based on the notion that a request for injunctive, declaratory, or other equitable relief triggers the historical powers of a court of equity, which can be used to justify, if they do not explain, a refusal to exercise jurisdiction ending in dismissal.⁹¹ The Court was less successful in bringing within the analytical fold post-1948 cases dismissing damages actions on the ground of *forum non conveniens*, to which it understandably imputed a separate history.⁹²

As a result of *Quackenbush*, in a case in which the plaintiff seeks only money damages, it would be improper for a federal court to dismiss rather than to stay on a theory of deference other than *forum non conveniens*, including abstention or *lis alibi pendens*, no matter where the duplicative or related proceedings are or may be lodged. A further result, I should think, would be to cause those courts that have looked to *Colorado River* for guidance in the international context to cease doing so. Those courts would thus have the opportunity, which they should seize, to consider analytical approaches that do not run to the opposite pole by treating the courts of Italy as if they were federal courts in another district.

5. CONCLUSION

Whether international civil litigation is now or should ever be thought a discrete field of law,⁹³ recent cases involving issues of forum selection suggest ways in which the United States can become a more discriminating, and hence a more effective, participant in the process of making law for international cases.

I have argued that the most troublesome aspect of the Supreme Court's decision in the *Schlunk* case⁹⁴ was not its holding, but rather the Court's approach to the interpretation of the Hague Service Convention and the attitude towards the relationship between domestic and international law that such an approach conveyed.⁹⁵ The recent district court decisions discussed here not only suggest that *Schlunk* will cause only limited damage

⁹¹ See *id.* at 1721.

⁹² See *id.* at 1724.

⁹³ See *supra* text accompanying notes 1-7. Mr. Born appears to have abandoned this claim in the most recent edition of his book. See BORN, *supra* note 27.

⁹⁴ Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988).

⁹⁵ See *supra* text accompanying notes 15-21.

from the perspective of those who disagree with its holding.⁹⁶ One of them evinces a more sympathetic attempt to reconcile domestic and international law.⁹⁷

Just as the addition of Rule 4(k)(2) to the Federal Rules of Civil Procedure solved a problem existing under prior domestic law,⁹⁸ so from an international perspective did it furnish additional cause for concern about exorbitant assertions of personal jurisdiction by United States courts.⁹⁹ Accordingly, it should be a source of reassurance in the international arena that most lower federal courts interpreting the new Rule have implemented the Supreme Court's sensitivity to the burdens of international litigation by imputing constraints to the Fifth Amendment that are similar to those the Court imputed to the Fourteenth.¹⁰⁰ Complete consistency in that regard, as in the treatment of tag jurisdiction, would be foolish,¹⁰¹ however, because of differences in historical circumstances, and because, as a result of the Supreme Court's decision in the *Burnham* case,¹⁰² Fourteenth Amendment limitations inadequately protect against the burdens of litigation, domestic and international.¹⁰³

Finally, we see in the recent history of *lis alibi pendens* a cautionary tale about borrowing solutions for problems in international cases from domestic cases. It is possible, however, that the problem arose as much from the incoherence of domestic models as it did from their thoughtless transference.

⁹⁶ See *supra* text accompanying notes 22-38.

⁹⁷ See *Quinn v. Keinicke*, 700 A.2d 147 (Del. Super. Ct. 1996); *supra* text accompanying notes 29-38.

⁹⁸ See *supra* text accompanying note 49.

⁹⁹ Thus, for instance, the standards for asserting personal jurisdiction used by U.S. courts, particularly in product liability cases, proved a roadblock in efforts to conclude a convention on the recognition of judgments with the United Kingdom. See Peter M. North, *The Draft U.K./U.S. Judgments Convention: A British Viewpoint*, 1 NW. J. INT'L L. & BUS. 219, 228-39 (1979).

¹⁰⁰ See *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102 (1987); *supra* text accompanying notes 55-61.

¹⁰¹ "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines." Ralph Waldo Emerson, *Self-Reliance*, in *ESSAYS & LECTURES* 265 (Joel Porte ed., 1983).

¹⁰² *Burnham v. Superior Court of Cal.*, 495 U.S. 604 (1990).

¹⁰³ See *supra* text accompanying notes 69-78.

In any event, the recent progress made in rationalizing domestic doctrine should make clearer than before differences in international cases that may call for different solutions.¹⁰⁴

¹⁰⁴*See supra* text accompanying notes 79-92.<https://scholarship.law.upenn.edu/jil/vol19/iss1/1>

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